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POLITICS AND THE CONSTITUTIONAL TRIBUNAL
THE CONSTITUTION—THE LAST INSTRUMENT OF DEFENCE AGAINST POLITICS*

I. INTRODUCTION

In one of his statements, a well-known leader of the governing party said that the redundancy and harmfulness of the Constitutional Tribunal (CT) arises primarily from the fact that this Court is, *de facto,* the third chamber of the Parliament. This claim is to be understood as an assumption that the CT usurps a function lying within the exclusive competence of a political organ and which may in no way be performed by an organ appointed to administer justice. Statements by other politicians commenting on the CT have contained repeated allegations that the rulings of the CT were essentially political and that the CT judges themselves acted as if they had a certain political mission to fulfil, always having to represent the interests of certain political circles. These allegations have never been supported by any evidence; they were always formulated without any context and took the form of a general assessment of all judicial decisions handed down by the CT since it was established. Another argument heard frequently in this context was that of the disproportionality of representation and democratic legitimacy between the Parliament and the CT. It was claimed that the former (the Parliament) was founded upon direct democratic legitimacy arising from a general election while the latter (the CT) has merely indirect legitimacy and what is more consists of a dozen or so members only, adjudicating in different compositions of between 3 and 15 members, which is in no way in reasonable proportion to the number of Members of the Parliament. Against this background, a frequently asked question was how was it possible to allow a situation in which Acts of a democratically elected parliament could be challenged by several, and at best a mere 15 judges. This argument was an explicit, not to say, obvious consequence of the earlier claims about the 'politicisation' of the constitutional court. Only the thesis of disproportionality could possibly have led to contrasting the political 'powers' of the two organs (the CT and the Parliament) without any recognition of the completely different functions they perform in the political system of the rule of law. All these statements echoed the opinion of Member of Parliament Kornel Morawiecki on the role of law in a democratic state expressed in his widely quoted speech about the will of the nation being above the law.

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II. REALITY AND THE POLITICAL NARRATIVE

Any polemic with the thesis that the CT has no democratic legitimacy to adjudicate over the will of the nation as represented in the Parliament does not really make any sense at this stage of the discussion about the democratic legal state because it would have to be based on banal argumentation that is commonly and very well known, not only among lawyers. It seems rather shameful and embarrassing, if not pathetic in contemporary Europe and in an EU Member State, to have to reiterate the obvious truth that the rule of law demands that legal regulations, particularly those grounded in constitutional norms should be respected, including by the parliamentary majority of a democratically elected Parliament, or that the function of a constitutional court and that of a parliament are fundamentally different. Therefore, without elaborating on this anymore, I only wish to conclude, with worried concern, that twenty-six years after the collapse of communism, prominent representatives of the political world must be reminded of things which belong to the canon principles on which the essence of contemporary democracy and the rule of law is based and described. What is, however, worthy of attention, is the relationship between politics and the CT which led some to the conclusion about its political character.

III. POLITICS AND THE JUSTICES OF THE CONSTITUTIONAL TRIBUNAL

There is no doubt that the appointment of judges is political. It cannot be otherwise if it is carried out by a political body, which by its nature a parliament is. Contrary to the opinions of some, I am by and large convinced that the indirect democratic legitimacy established in this way for the justices of the CT is justified and ought also to be maintained in the future. The task of the CT is to evaluate the products of a political debate. These products are Acts of Parliament. It also examines the constitutionality of the legislative procedures used, and determines the final interpretation of constitutional norms which subsequently constitute the framework within which the legislative power functions. Thus the influence of the Parliament on the composition of the CT seems completely natural and compatible with the idea of its function as a reviewer of the constitutionality of the law. What are worthy of discussion though, are the criteria for the appointment of the judges, and more precisely, the requirements that the candidates ought to satisfy, and the elective process itself, which should be long enough to allow the proper presentation of candidates before public opinion, and which ought to ensure a chance for reliable legal and scholarly circles to express their opinions on the candidates. It should be noted that all these elements were present in the draft act on the CT put forward by the President of the Republic of Poland and proposed by the CT itself but were, sadly, removed from it in the course of the legislative process (particularly the provision that the opinions of non-political circles were also required).

However, regardless of the form of the formal requirements and the procedure for appointing CT judges, the objections or the stigma of their political origin will always be there. And yet, contrary to the opinions voiced in recent months in the form of an *a priori* truth, there exists no connection (*iunctim*) between the political appointment of judges and political adjudication. The fact that someone has views, including political ones, does not constitute grounds for claiming that the judicial decisions of the CT are political. Each mature and fully qualified lawyer has his or her own vision of reality, moral beliefs and the preferences derived from them, as well as his or her own concept of the rule of law and politics. However (and luckily) justices appointed to the Tribunal do not come 'from nowhere' without any already shaped views or previously formed attitudes to public life. What is more, at the moment of their appointment, their convictions, views, preferences and public activities ought to be publicly known. Hence such importance is attached to the principle of the transparency of the appointment process. This observation is not only true of the Polish political context. Everywhere the process of appointing judges to such institutions as constitutional courts or supreme courts (with the competences of constitutional courts) is conducted under a spotlight (and not necessarily at night!) and is always the subject of the utmost public interest.

The process of the adjudication, interpretation and application of the constitution, however, does not consist in shaping the law according to one's vision of the world, but in the search for solutions that will comply as well as possible with the constitutional values and principles, of which the judges are the slaves not so much of their beliefs and convictions, but of the will of the sovereign, as expressed in the constitution. This is not, on my part, an empty and abstract, or utopian assumption. Based on my long experience as a CT judge, I can say with conviction that many times, like many of my colleagues, I faced the difficult dilemma between choosing a constitutional solution differing from my own moral or political preferences, and a solution which agreed with my preferences but was in conflict with a constitutional norm. In such situations I voted for a solution that was compatible with the Constitution and my case is not unique. The CT judges are capable of leaving their personal political views outside the courtroom. It should also be remembered that in the deliberation room there prevails a world of different values and different choices than in the world of politics—this is the 'loneliness' of a judge who will be helped by no one in coming to a final decision, thereby he or she will either remain faithful to his or her mission as a guarantor of the highest law, or betray it. In such situations, in a symbolic sense judges have nothing to lose: they are not playing a 'political match' and will also be excluded from playing in such a 'match' in the future. They are guaranteed independence not only during their active professional lives but also after they have retired. From this point of view to say that judges are executors, or agents of a political will seems totally unjust and fundamentally different from the real state of affairs. Having said that, I cannot at the same time deny the existence of situations in which a judge indulges in a certain subjectivisation of the constitutional values and principles and basing on his or her own view seeks the right decision. This happens when we have to deal with moral choices or hard cases in which a judge finds himself in the

situation of Dworkin's judge Hercules who must evaluate a constitutional principle which is in a way inconsistent in its contents or choose between values represented by different or conflicting principles, or fundamental rights. Such situations cannot be avoided and they result from the nature of adjudication in constitutional matters, for example when a choice must be made between the principle of free speech and the principle of privacy, or between the protection of the right of ownership and a social interest or the interests of particular social groups (e.g. tenants), or between an efficient or effective court case and the restriction of the right to litigation of one party which may be the case in simplified proceedings, or between the principle of procedural justice and financial fairness, and the like.

The hardest cases to deal with emerged during the period of transformation and reconciliation with the past in particular (as in the case of 'lustration' or the vetting of the actions of public officials) or when especially difficult and delicate questions were deliberated against the background of solutions dictated by certain axiological choices, or value judgements (e.g. the Abortion Act, issues concerning the teaching of religion in schools or grades in religion appearing on school certificates). There is no one possible answer to these questions and others like them and the margin of judicial assessment in such matters is relatively broad and includes dissenting opinions expressed externally. Such differences in the area of judicial sensitivity and axiological preferences have always been there in all constitutional courts (tribunals), but their existence cannot be interpreted in political terms and constitute proof of the politicisation of the judges of the CT. The reason why judges are granted the position of independent arbitrators stems from the fact that the questions on which they adjudicate are exceptionally complex and frequently controversial, with a divergence of arguments arising from a real dispute. This is not, however, a political dispute, but a dispute on the ground of the Constitution, in which it would be extremely risky to establish correlations between an axiological choice concerning certain constitutionally grounded principles and political views. In 1998, among those judges who supported the motion to limit the scope of lustration adopted by the majority of the AWS party (Solidarity Electoral Action) which was then was the main party in the coalition government, and who voted for the adoption of criteria that would 'civilise' the qualification of certain persons as undercover, secret agents, were also judges recommended by the AWS. Likewise in 2007 when the Tribunal adjudicated on the unconstitutionality of the lustration Act proposed by the first PiS (Law and Justice) government headed by Jarosław Kaczyński, there were also judges victimised during the communist period who voted against the proposed law; among those who voted for leaving the grades in religion among other final results on school certificates were also judges recommended by the political left; while among those who voted in favour of the decision of 30 November 2015 (K 34/15) to take preventive measures requesting the Sejm to abstain from electing new judges until the final verdict in case K 34/15 was delivered were also judges appointed to the CT on the recommendation of PiS. As can be seen from this brief and superficial review, the building of a political narrative with reference to the rulings of the CT is not only untrue but also simply unjust.

It is untrue and unfair, also to bandy words thoughtlessly, or to refer to the political uniformity of the composition of the adjudicating judges of the CT or to the lack of a pluralism reflecting different (political) options represented in the Parliament.

Between 2006 and 2015 among the 15 judges of the CT, there were 9 appointed on the recommendation or at least with significant support from PiS or a party in coalition with PiS. In the current 12-member composition of adjudicating judges, 6 were recommended by or appointed with significant support from PiS. This is worth remembering in a situation when today, in the name of 'healing' the CT and eliminating the bad practices of the past, new judges are appointed in an extraordinary manner without having been previously presented either to the Parliament or the public, and such appointments are based on a vote not even preceded by a discussion about the candidates, to give it at least the appearance of normality, at night within a few hours of their nomination as candidates. This leads to another reflexion: the existence of the political pressure exerted on the constitutional court which has become apparent at this stage of the constitutional crisis in Poland.

IV. PRESSURE ON THE TRIBUNAL

As I have attempted to show above, politics is not, and most certainly does not have to be present in a constitutional court simply by virtue of the fact that the appointment of judges is political. However, politics does come into play when it usurps to become an independent factor determining the functioning of the Constitutional Tribunal. In my opinion today we are facing such a situation, for the first time in the 30-year history of the constitutional judiciary in Poland. The pressure exerted on the CT is manifest on different levels, with the use of many instruments. We see a whole range of behaviour such as: undermining the importance and authority of the CT's rulings, the refusal to publish forthwith the decisions handed down by the CT, the ostentatious refusal by the highest organs of the State to implement the CT decisions (this concerns the judgment of 3 December 2015 in case K 34/15 as well as the order of 30 November 2015), threatening the judges with penal and disciplinary proceedings on the grounds of the illegality of the procedural decisions they make (such as the decision of the President of the CT regarding the 5-member composition of the CT, when the Tribunal investigated the motion that the Act on the CT of 25 June 2015 is unconstitutional), the application of a sanction aimed to cut down the budget (and, it must be added, in a manner making it impossible for the CT to meet its payment of remuneration obligations in 2016) or the threat to move the premises of the CT from Warsaw to the 'Eastern borderlands' (which cannot be justified either in the tradition of the Polish political system or by any other objective reasons, not to mention the huge cost of such an undertaking), the pursuit of the termination of the incumbent's presidency of the CT (Act of 19 November 2015 providing for the termination of the tenure of the CT's President and Vice-President); the direct and indirect personal attacks on the President of the CT Professor Andrzej Rzepliński, and—last but not least and most importantly—implementation

of a 'repair' solution taking the form of the Act of 22 December 2015 which, while essentially restricting the procedural autonomy of the CT, is leading in practice to the paralysis of its work. The latter Act of Parliament arouses the greatest controversy and must be given some attention.

Without prejudging the future decision of the CT itself, it may be claimed that this Act carries a risk of it being contrary to the Constitution in at least some essential points. The most sensitive ones and those which are most difficult to defend are the provisions which:

— alter fundamentally the procedural autonomy of the CT, by forcing the judges to consider motions strictly in the sequence in which they were filed;

— stipulate a qualified majority of two thirds of votes when the CT hears cases as a full bench (Article 190 para. 5 of the Constitution provides for a simple majority of votes);

— stipulate the minimum full bench (the quorum) of the CT as 13 judges (which may in many cases lead to the blocking of the adjudicating function of the Tribunal);

— provide for the possibility of initiating disciplinary proceedings by the President of the Republic of Poland or the Minister of Justice (such a competence may infringe the independence of the judges of the CT).

V. IS THE CONSTITUTIONAL MECHANISM SUFFICIENTLY EFFECTIVE TO PROTECT THE SYSTEM OF THE CONSTITUTIONAL REVIEW OF THE LAW?

The solutions adopted in the Act of 22 December 2015 have undoubtedly created a kind of 'trap' which, put simply boils to the following dilemma: while on the one hand the enforcement of the Act would mean that adjudicating as a full bench (which is required in a great number of particularly important cases) would have been blocked owing to the insufficient number of CT judges (when 13 are required) in a situation when the President of the Republic of Poland refuses to accept the oaths of 3 judges appointed by the Sejm of the previous term and, on the other hand, the refusal to apply the provisions of the Act exposes the CT to allegations that it violates the principle which it has itself developed, which is the principle of the presumption of the constitutionality of an Act until its unconstitutionality has been determined. Under such circumstances, the question arises clearly whether and on what grounds the CT can accept a new procedural Act as the basis for its adjudication whilst refusing at the same time to apply it. The rationale given by the CT in its order of 14 January 2016 in case K 47/15 is (which is understandable) extremely laconic but at the same time very precise. The CT emphasised the supremacy of the Constitution stressing that it 'is obliged to perform its functions, which include: 'safeguarding the constitutional fundamental rights and the supreme role of the Constitution as well as other values of a democratic legal state. The competences of the Tribunal involve among other things the constitutional review of all acts of Parliament and none has been excluded from the scope of the competences, not even the one on the functioning of the Constitutional Tribunal.'

We may now proceed further in this reasoning and add a handful of other arguments and take a broader look at the issue of the direct application of the Constitution, which is of a significance going far beyond the current dilemma concerning the CT. The supremacy of the Constitution with regard to the adjudicating functions of the CT is reflected first of all in the absolute subordination of the judges to the Constitution (Article 195 para. 1). This means that no Act may by itself determine the framework within which the constitutionality of the law is to be determined. The provisions of Article 197 of the Constitution (the organisation and the proceedings before the CT are determined in the Act) cannot by any means be understood as a restriction of the scope of the supervision of the constitutionality of procedural norms because that would broaden and leave wide open the legislative possibilities of simply excluding or paralysing the adjudicating functions of the CT. The fact that the legislator takes up a competence specified directly in the Constitution such as the case regarding Article 197 does not mean the exclusion of the application of another constitutional norm providing for the direct application of the Constitution in adjudicating the constitutionality of laws. This norm is of key importance for the essence of the mechanism which is the constitutional review of the law. Thus it cannot be assumed that a reasonable legislator allows the introduction to the statutory regulation of provisions, which eliminate the possibility of the efficient and actual real performance by constitutional bodies of their functions when such bodies have competences unequivocally specified in a given political system. Such a solution would have been not only irrational but internally contradictory as it could lead to a change of the institutional norm of the political regime (to which constitutional review belongs) through an ordinary Act of parliament, ignoring the procedure for amending the Constitution. Already an assumption like this would have contained an irreparable logical error for the following reason: the qualification of a norm *X* as a supreme norm or a norm higher in the hierarchy is not an obstacle for this norm to provide competences for it being removed from the legal order by a norm lower in the hierarchy. Under such an assumption the role of norms remaining in a hierarchical dependence would have become irrevocably reversed—a lower norm would have become a higher one. This would in consequence lead to a direct infringement of the principles constituting the internal morality of law, excellently identified by Lon Fuller (*The Morality of Law*), which determines the certain absolute minimum that must be respected by legal norms (the requirement that law must be publically promulgated, that it must be prospective, meaning that it cannot be used retrospectively, that the norm must be possible to be implemented, or that it must be free of contradictions, which means that an ordered conduct cannot at the same time be treated as illegal behaviour). This last principle is contrary to what certain political circles expect from the CT today. Demanding that statutory procedural norms be respected without their constitutional review must be in this case considered as a violation of a constitutional norm.

The wrong reasoning rejecting the argumentation presented here may easily be detected based on the *reductio ad absurdum* principle. If, within the framework of a procedure determining the proceedings before the CT an obligation has been provided that the preparatory proceeding in a case ought

not to be shorter than twenty four months, the hearings before the CT would not be more frequent than once each two months or take place only at night (which today should not be met with too much surprise)—such formal and dogmatic adherence to the principle of the presumption of constitutionality of an act of parliament would *de facto* annihilate the review of the constitutionality of the law. This *ad absurdum* reasoning could be continued, and it may, for example, be assumed that the legislator, by an ordinary Act, liquidates the constitutional review of law and the CT—because since such an ordinary Act would benefit from the principle of the presumption of its constitutionality, once entered into force, it would create a situation in which a constitutional review of any of these regulations would be impossible, both at present and in the future as well. This 'entanglement' in the principle of the presumption of constitutionality, treated as an *a priori* dogma for each and every situation, would inevitably lead to tragic consequences for the very existence of the Constitution. But this of course does not have to happen if the hierarchy of norms, the principles of a rational legislator, of a non-contradictory law and of the interpretation of law in compliance with its goals and essence are respected. This is exactly what we expect from the judges of the Constitutional Tribunal.

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POLITICS AND THE CONSTITUTIONAL TRIBUNAL. THE CONSTITUTION—THE LAST INSTRUMENT OF DEFENCE AGAINST POLITICS

Summary

In the first part of this paper an attempt is made to answer the question to what extent the fact that judges of the Constitutional Tribunal are appointed by a political organ (the Sejm of the Republic of Poland) determines the political character of the Tribunal itself. Based, among other things, on his own experience, the author, a retired judge of the Constitutional Tribunal, states that the search for a *iunctim* between the political appointment of constitutional judges and their adjudicating activity is unjustified, as can be seen from the example of particular judgments delivered by the Constitutional Tribunal in what might be termed *hard cases*. Judges endowed with very strong guarantees of independence are capable of remaining impartial in their judgments and making decisions independently of their personal beliefs. The real threat to the independence of the Constitutional Tribunal is political pressure exercised by government, which manifests itself in, for example, direct and personal criticism of Constitutional Tribunal judges or a refusal to implement judicial decisions issued by the Constitutional Tribunal. A particularly dangerous situation arises when a legislator attempts to intervene in the internal procedural autonomy of the Constitutional Tribunal with a view to determining the order in which the matters before the Tribunal should be dealt with, setting a $^{2}/_{3}$ qualified majority for decisions 'when sitting as a full court' or determining the required *quorum* at a level which may paralyse the work of the Constitutional Tribunal altogether. In the second part of the paper the question is asked whether the Constitutional Tribunal may examine the constitutionality of the procedures being introduced by a new law on the Constitutional Tribunal before it proceeds to apply them. The answer to this question is in the affirmative, followed by arguments calling for the direct application of the Constitution which in such cases becomes the only point of reference when new procedural regulations are to be evaluated.